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In The

Supreme Court of the United States

October Term, 1982

IRVING COTLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioner was deprived of due process of law and a fair trial by the denial of his numerous motions for severance, despite the fact that the record reveals such hostility by the other three co-defendants against Cotler as to preclude the possibility of a fair trial?

2. Whether remarks by co-defendants at trial, referring to Cotler's failure to take the stand in his own defense, thus precluding them from cross-examining him, rendered a fair trial impossible, and whether the court below erred in failing to grant a severance, despite its advance awareness that these arguments would be made by co-defendants against Cotler?

3. Whether this Court should, once and for all, resolve the issue left unsettled in *United States v. White,* 401 U.S. 745, as to whether court orders are required for electronic surveillance where only one party to such surveillance has knowledge thereof and consents thereto?

4. Whether the indictment should have been dismissed because "RICO"and "RICO conspiracy" do not apply to "criminal venture" types of enterprises, and the joining of these counts violated Rule 8(b) of the Federal Rules of Criminal Procedure?

5. Whether the Government's use of "RICO" in the case at bar exceeded its statutory scope and purpose?

6. Whether the *nisi prius* court erred in failing to suppress evidence gathered as a result of court-authorized wiretaps and searches, in view of the fact that these failed to satisfy the requirements of *Aguilar* and *Spinelli,* and in view of the fact that the five search warrants issued in reliance upon an affidavit were so overly broad as to constitute "general warrants"?

7. Whether it was error for the trial court to deny petitioner's motion for the psychiatric examination of two key Government witnesses who had manifested serious and aberrant psychiatric and behavioral tendencies and symptoms?

8. Whether the procedures of the grand jury were valid and constitutional since not all of the twelve grand jurors who voted for the indictment attended every session at which evidence was received?

PARTIES

The parties in the court below at trial were the petitioner herein; Nunzio Provenzano, Salvatore Provenzano and Michael Sciarra, as well as the United States of America.

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Reasons for Granting the Writ:

I. Petitioner was extremely prejudiced by the refusal of the trial court to grant his motions made pre-trial and during trial, for a severance. The trial judge was well aware that the defenses of the three co-defendants of petitioner at trial were strongly antagonistic to that of Cotler, which, in essence, converted the trial into a "four-attorney prosecution of Cotler", since the co-defendants, as well as the Government, joined in attacking Cotler as the main culprit.

A. This situation was exacerbated by the fact that only Cotler omitted to take the witness stand, which fact was insidiously insinuated to the jurors, to the great detriment and prejudice of petitioner.

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B. Moreover, petitioner maintains there was a clear misjoinder of Cotler with the other defendants at trial. 5

II. The grand jury that indicted the petitioner herein comprised a quorum of twelve persons who did not attend all twenty-three sessions of that body. Accordingly, the grand jury which voted the indictment could not possibly have acted within the contemplation of Federal Rules of Criminal Procedure 6(f). 16

III. The failure to suppress evidence gathered as a result of court-authorized wiretaps and searches and seizures were error since the supporting affidavit failed to demonstrate the probable cause to conduct a search at the times and places requested. Moreover, the requirements of such cases as *Aguilar v. United States,* 378 U.S. 108, 12 L. Ed. 2d 723, and *Spinelli v. United States,* 393 U.S. 401, 21 L. Ed. 2d 637, were not honored. Finally, the five search warrants issued in reliance upon the Hersh affidavit were so overly broad as to constitute "general warrants". 21

IV. Once and for all, we ask this Court to resolve the dilemma which exists because of the decision in *United States v. White,* 401 U.S. 745, 28 L. Ed. 453, which was a plurality opinion of this Court, and which alone is relied upon by lower courts to authorize participant monitoring and taping of conversations without court order, upon the pretext that one of the participants to the conversation has consented thereto. 23

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No.

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IRVING COTLER,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Third Circuit is annexed hereto as an appendix.

JURISDICTION

(a) The judgment of conviction was rendered July 17, 1981 convicting the petitioner of a two-count "RICO" indictment [18 U.S.C. §§1962(c) and (d)].

Of the four defendants on trial, two were acquitted, and two were convicted, namely the petitioner herein and Nunzio Provenzano.

The defendants, as well as the petitioner herein, were indicted for violations of 18 U.S.C. §1962(c), as well as a conspiracy in connection therewith.

The charges allegedly rose out of the defendants' activities in obtaining illegal payments from four trucking companies in order to secure labor peace. The prosecution was under the so-called "RICO" statute.

(b) The order and judgment of affirmance of the United States Court of Appeals for the Third Circuit was dated September 1, 1982. A copy of an opinion rendered in connection therewith is annexed as an appendix hereto.

A petition for rehearing was filed, but on September 27, 1982, the court denied the rehearing. A copy of the order denying the "*sur* petition for rehearing" is annexed hereto as part of the appendix.

(c) Jurisdiction to review the judgment in question by certiorari is conferred under 28 U.S.C. §§1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth and Sixth Amendments of the United States Constitution, as well as the so-called "RICO" statute, 18 U.S.C. §1962, are involved. In addition, 18 U.S.C. §1961 is involved as well.[1]

STATEMENT OF THE CASE

Irving Cotler, the petitioner herein, was the owner of several trucking companies which had no contracts with Local 560 of the Teamsters Union, with which co-defendant Nunzio Provenzano was affiliated.

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1. Copies of the pertinent portions of the aforesaid statutes, because of their length, will be annexed as part of the appendix.

Nunzio Provenzano served in various capacities in the Teamsters Union Local 560 in Northern New Jersey, progressing from business agent to secretary-treasurer, and ultimately to president in 1975.

During the period covered by the indictment, the labor contract between Local 560 and signatory companies contained a "city man rule". Supposedly, this provision mandated that trucking companies hauling iron, steel, and special commodities within the jurisdiction of Local 560 were required to secure express authorization for its operations from the union. Without such approval, a company would be required to utilize the services of a Local 560 "city man" during pickup and delivery.

One Ray Dee acted as the North Jersey agent for All States Trucking Company.

In 1972, following Provenzano becoming the union's business agent, the permanent "city man" assigned to All States Trucking Company was discharged, and shortly after this Dee began making payments to petitioner Cotler. These payments, supposedly, were to permit All States to operate without the use of a "city man".

The Court of Appeals found that in 1975 All States expanded its operation and began using an additional agent named Joe Mabus. He made payments to Provenzano through another intermediary until he was imprisoned in early 1975. Following that, Mabus made no further payments and a few months later Local 560 struck All States Trucking Company.

The strike concluded when All States' president discharged Mabus and agreed to use "city men". The Ray Dee Agency's transactions, however, were not affected by the strike.

About a year later, All States' vice-president met with Provenzano in a preliminary step to reopen an iron and steel agency in Local 560's area.

Ultimately the Government introduced evidence that a meeting took place between the vice-president and petitioner Cotler, which was arranged through Ray Dee, Jr.

Supposedly, at this meeting, Cotler said All States would not need a "city man" for any of its shipments. Cotler allegedly then brought the vice-president to Local 560's offices, where they conferred with Nunzio Provenzano, who stated that Cotler was a "good friend" and advised the vice-president to "listen to what he's telling you".

For the next three years, All States arranged to have Ray Dee, Jr. pay Cotler $100 per day, in addition to Dee's own payments to protect his agency.

In 1975, another trucking company, T.I.M.E.-D.C., began special commodity operations in North Jersey, and hired Joe Szapor as its agent. Through Teamster contacts, Szapor had a meeting with Provenzano and three other men. The agent was assured he would be contacted, and some time later Szapor was introduced to Cotler.

Cotler said he would be collecting for Local 560, and supposedly told Szapor not to travel to the union itself.

During the next year, Cotler was given $500 per month and T.I.M.E. was able to avoid using "city men".

T.I.M.E.'s business began to prosper and Cotler allegedly said that monthly payments should be increased.

To this, T.I.M.E. acquiesced, but a number of grievances with Local 560 developed. Szapor protested to Provenzano about these problems since T.I.M.E. was making its regular payments.

Provenzano told Szapor to resolve the grievances at the terminal level. When Szapor then spoke to Local 560's business agent, the grievances were in fact settled.

Similar arrangements were negotiated with two other trucking companies between 1977 and 1979, namely Helms Express and Mason and Dixon Corp., which supposedly paid Cotler through the Szapor and Ray Dee Agencies, respectively.

Mason and Dixon paid a fixed weekly fee, but Helms was required to remit a percentage of its revenues.

The jury, as we have indicated, convicted Cotler and Provenzano on both counts of the indictment.

REASONS FOR GRANTING THE WRIT

I.

Petitioner was extremely prejudiced by the refusal of the trial court to grant his motions made pre-trial and during trial, for a severance. The trial judge was well aware that the defenses of the three co-defendants of petitioner at trial were strongly antagonistic to that of Cotler, which, in essence, converted the trial into a "four-attorney prosecution of Cotler", since the co-defendants, as well as the Government, joined in attacking Cotler as the main culprit.

(A) This situation was exacerbated by the fact that only Cotler omitted to take the witness stand, which fact was insidiously insinuated to the jurors, to the great detriment and prejudice of petitioner.

(B) Moreover, petitioner maintains there was a clear misjoinder of Cotler with the other defendants at trial.

In the case at bar there is no dispute about the fact that petitioner moved at both pre-trial and during trial, for severances. Early on it became obvious that there was extreme antagonism among the four defendants at trial with respect to Cotler. Three of the four defendants let it be known that their strategies would unmistakably direct evidence of guilt at Cotler, to the exclusion of their respective claims.

There was harmony in the defense of the three co-defendants of Cotler, but not vis-a-vis himself.

A perusal of the record reveals unmistakably, that for all intents and purposes, Cotler was being prosecuted by four lawyers,

namely the attorneys for the three co-defendants on trial with him, and the prosecuting attorney.

Federal Rule of Criminal Procedure 14 (hereinafter F. R. Cr. P. 14) is controlling with respect to relief from prejudicial joinder of defendants.

Joinder of offenses against a single defendant may or may not be prejudicial. Joinder of defendants is very frequently prejudicial. The seeming reluctance, however, of the courts to enforce F. R. Cr. P. 14 and grant relief from such prejudice has been sharply criticized:

> "A third serious problem arising from the existing Federal Criminal Rules centers on *Rule 14*, which is entitled 'Relief from Prejudicial Joinder', *but might as well be entitled 'No Relief from Prejudicial Joinder'* as now construed . . .
>
> The only justification for the mass trials that Rule 14 encourages is that the cheapest, easiest way to send a large group of people to jail is to dispatch them at the same time. The mass transportation permitted by Rule 14 explains why the expression 'railroading a man to jail' has come to signify unfairness and injustice." (Walsh, *Fair Trials and the Federal Rules of Criminal Procedure*, 1963, 49 A.B.A.J. 853, 856-857).

In addition, criticism of the enforcement or, rather, non-enforcement of the rule, appeared in a note, *Joinder of Defendants in Criminal Prosecutions*, 1967, 42 N.Y.U.L. Rev. 513, 535:

> "The current manner in which most trial courts administer Federal Rule 14, however, is not consonant either with the purpose of that rule or with the rules in general."

It is also not disputed that a trial judge has a continuing duty to grant a severance if prejudice appears in the light of later

developments during the trial. [*Schaffer v. United States*, 326 U.S. 511, 4 L. Ed. 2d 921 (1960)].

Thus, it is obvious that a motion for severance might be properly denied at an early part of a trial, nevertheless may be required by events as they develop during the trial.

Counsel for Mr. Cotler, during both his pre-trial motion for severance (A130-133) and his renewed motions throughout the course of the trial, placed great emphasis upon the existence of "antagonistic" defenses between his client and the other defendants as grounds for severance. Several courts have granted or recognized the need for severance when such a conflict between defenses is posed. *See, e.g., United States v. Crawford*, 581 F. 2d 489 (5th Cir. 1978); *United States v. Johnson*, 478 F. 2d 1129 (5th Cir. 1973); *United States v. Abrahams*, 466 F. Supp. 552 (D. Mass. 1978); *United States v. Valdes*, 262 F. Supp. 474 (D.P.R. 1967).

An inseparable adjunct to petitioner's argument on the practical effect of antagonistic defenses is the multiple adversaries the criminal defendant in such a situation is compelled to face (A131). That effect was noted with particularity in each of the four cases cited immediately above (*Johnson, Crawford, Abrahams* and *Valdes*) but perhaps best articulated in the language of the court in *Crawford*:

> "Each was the government's best witness against the other. Each defendant had to confront not only hostile witnesses presented by the government, but also hostile witnesses prsented by his co-defendant. Witnesses against each defendant were thus examined by one adversary and cross-examined by another adversary. A fair trial was impossible under these inherently prejudicial conditions." 581 F. 2d *supra* at 492.

In denying Mr. Cotler's pre-trial motion for severance (without prejudice and with leave to renew same at a later time, A134), the trial judge specified that what troubled him most was that the motion might be premature (A132). He went on to note

that Mr. Cotler's argument, though meritorious, was based essentially upon suppositions and possibilities as to relative defenses by the co-defendants (A132-133). However, it did not take the various co-defendants long to make their respective positions with respect to Irving Cotler quite clear.

In their opening statements, all three counsel for the co-defendants at trial emphasized repeatedly the hostility between Cotler on the one hand, and their respective clients on the other. This was repeated throughout the case, and especially in summations. Each branded Cotler as the culprit.

So virulent and vehement were the denunciations of Cotler by counsel for the co-defendants, that in all respects it can be clearly demonstrated that for all intents and purposes Cotler was being "prosecuted" by the three co-defendants and the Government.

The trial court, while denying motions for severance which were repeated time and again, ruled that the denials were without prejudice.

When in summations the attorneys for the co-defendants unmistakably insinuated that Cotler had not taken the witness stand and, therefore, could not be cross-examined, the prejudice was exacerbated to the point of precluding the possibility of a fair trial. In our brief in the court below elaborate treatment of this issue was given, but space in the petition for certiorari precludes the type of discourse and analysis which this point deserves (A145-147, 150, 157-158, 178-183, 185-187, 251-254, 266-274, 293-296, 301-305, PA67-72[2]).

For the court below to have stated that the defenses were really "harmonious" instead of antagonistic is incredible, since the record reveals the complete contrary. We urge this Court to

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2. The prefix "A" refers to petitioner Cotler's appendix in the court below; the prefix "PA" refers to co-appellant Nunzio Provenzano's appendix in the Court of Appeals. The suffix "a" refers to petitioner Cotter's appendix to this Court, *infra*.

review the appendices and other material in this case, since it is submitted that with all due respect to the Third Circuit, it could not possibly have appreciated the gross unfairness that the denial of a severance created in the case at bar, so far as petitioner Cotler is concerned.

Faced with four adversaries instead of one, his defense posture was different than it might have been and the personal ridicule and acrimony injected against him by his co-defendants only seemed to heighten the aura of isolation with which he was surrounded in the eyes of the jurors. Indeed, "[a] fair trial was impossible under these inherently prejudicial conditions." *Crawford,* 581 F. 2d *supra* at 492. *See Valdes,* 262 F. Supp. *supra.*

In considering a motion for severance, it is entirely proper for the court to weigh the conflicting forces operating upon the defendant's choice of whether to testify in his own defense or not. *See, e.g., Cross v. United States,* 335 F. 2d 987 (D.C. Cir. 1964). As will be shown, powerful forces were at work in this matter — forces calculated to compel Irving Cotler to either take the stand or to exact a terrible price if he did not.

In *Cross v. United States,* 335 F. 2d 987 (D.C. Cir. 1964), the court found prejudicial joinder of offenses which served to compel a defendant to testify concerning a count upon which he had wished to remain silent. Judge Bazelon's opinion forcefully reflected his concern that prejudice is virtually inevitable whenever joinder "embarrasses or confounds an accused in making his defense." *Id.* at 989. While the joinder of offenses may be procedurally distinct from the joinder of defendants, F. R. Crim. P. 14 appears to encompass both and the spirit of judicial efforts at minimizing the impact of improper pressures upon the defendant's choice to remain silent should be applicable to both. *Cross,* 355 F. 2d *supra* at 989.

Most commentators agree that the seminal case dealing with the propriety of a defense attorney whose client takes the stand commenting or alluding to a co-defendant's failure to do so is *DeLuna v. United States,* 308 F. 2d 140 (5th Cir. 1962). In *DeLuna,* the court held that comments from a co-defendant's attorney emphasizing the silence of the other defendants while his own

client was willing to testify were prejudicial and warranted a new trial. *Id.* at 141.

There can be no question but that the problem of one defendant commenting upon a fellow defendant's failure to take the stand is a "substantial and troublesome one." *Hayes v. United States*, 329 F. 2d 209, 221 (8th Cir. 1964). It is doubly-so when those "comments" are indirect, subtle and even unspoken yet devastatingly lethal to a defendant's absolute right to remain silent and not suffer for the exercise of that right. Courts have recognized violations of Fifth Amendment rights notwithstanding the absence of direct comments or bad faith. *See, e.g., United States v. Harbin*, 601 F. 2d 773 (5th Cir. 1979) (oblique comments, if sufficiently suggestive, tantamount to direct comment); *United States v. Staller*, 616 F [illegible] 1284 (5th Cir. 1980) (no matter that comment by Government witness not anticipated).

There can be no overemphasizing the important effect upon the jury created by the fact that Nunzio Provenzano, Salvatore Provenzano and Michael Sciarra all testified in their own defense. Irving Cotler alone did not. Of course, all defendants were exercising their respective and absolute rights in so doing. But the prejudice and danger of the jurors drawing an improper conclusion was inevitable. The only conceivable cure for this situation was severance. Notably, the trial judge denied Mr. Cotler's pre-trial motion for severance upon the basis that it was speculative and that defense counsel was only "anticipating things that may happen" (A132-133). Once the last of his three co-defendants took the stand and it was clear that Mr. Cotler would not, that alone might have justified the court in ordering a severance. At that point, the statistical likelihood of prejudice to Irving Cotler in the minds of the jury had become an incurable probability.

Yet the defense strategies of Mr. Cotler's three co-defendants went beyond merely assuming the witness stand and thus emphasizing his failure to do so. The obvious attempts to disavow any relationship with Irving Cotler and the personal, often vitriolic comments about him have been recounted above. These merely set the stage for affirmative — albeit subtle — comments concerning Mr. Cotler's silence in the courtroom. By the time

the jurors began their deliberations these comments, spoken and unspoken, filled the very air the jurors breathed. As noted by several jurisdictions and at least one legal commentator:

> "A problem somewhat similar to *de Luna* arises when one defendant seeks to extricate himself at another's expense, not by testifying against his co-defendant, but by conducting his defense in a manner calculated to prejudice the jury against his co-defendant.
>
> This may be attempted in the cross-examination of witnesses, in opening and closing statements, and in a number of subtle and extra-legal ways." 8 Moore's Federal Practice §14.04(3) *and cases therein.*

Few rules of trial practice are as immediate and decisive as that which forbids comment by the prosecutor upon a defendant's failure to testify. *Griffin v. California,* 380 U.S. 609, 14 L. Ed. 2d 196 (1965). It is respectfully submitted that under the circumstances peculiar to the instant matter the policy meant to be served by that rule was utterly emasculated. The comments made by defense counsel here, whether direct or indirect and regardless of their source, were at the expense of Irving Cotler's absolute right to remain silent and not suffer for the exercise of that right.

In the end, the tragedy that was played out on that stage was totally at variance with Irving Cotler's fundamental right to a fair trial and was abhorrent to our most basic precepts of due process.

The record below demonstrates clear "Misjoinder" within the meaning of Federal Rule of Criminal Procedure 8(b). The offenses claimed as constituting the racketeering activity were a series of violations of 29 U.S.C. §186(b) committed at various times between 1971 and 1980. These alleged violations consisted of taking money from employers to influence officers of the union with respect to their actions as representatives of the employees.

Only Cotler was not a member of this union. He was the operator of a trucking firm.

The indictment alleged a conspiracy to extort money from other trucking companies in exchange for overlooking the failure of these companies to comply with an onerous obligation of the collective bargaining agreement requiring the trucking companies to employ the services of a "city man" when special commodities were shipped into or out of the area of Local 560's jurisdiction. (PA67-72).

The alleged conspiracy centers around the three defendants who were officers of Local 560, to collect and extort money from certain truckers in connection with the so-called "city-man" provision of the collective bargaining agreement. Petitioner Cotler was engaged in this single conspiracy on the grounds that he "unlawfully did aid, abet, counsel, induce, procure, and willfully cause the commission of the said offenses".

Acutely antagonistic defenses of the three defendants, who were union officials, in contradiction to Cotler who was not affiliated with the union at all, we maintain that there were at least two, and possibly more, conspiracies established by the evidence. We are not conceding that any violation of law was proved so far as Cotler is concerned, under the terms of this indictment, but arguendo we maintain that if proved, at least two or more had to be established.

The Government was obligated to establish an actual agreement to commit a substantive "RICO" offense. "To be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have *objectively manifested* an agreement to participate directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes." [*See United States v. Elliott*, 571 F. 2d 880 at 903 (5 Cir.), *cert. denied*, 439 U.S. 953, 99 S. Ct. 349 (1978)].

It is now well-settled that a material variance between the indictment and the Government's evidence is created by the Government's proof of multiple conspiracies under an indictment alleging a single conspiracy.

This multiple conspiracy doctrine is commonly illustrated by the Supreme Court's decision in *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239 (1946). The indictment in *Kotteakos* alleged a single conspiracy to obtain Government loans by making fraudulent representations, but the Government's proof at trial, by its own admission, demonstrated eight separate conspiracies. The common element in those conspiracies consisted solely of one man who had directed each group; aside from this single defendant, there was no connection among the various agreements.

As the Supreme Court aptly described these multiple conspiracies, the pattern established by the Government there consisted of "separate spokes meeting in a common center" but "without the rim of the wheel to enclose the spokes". (328 U.S. at 755, 66 S. Ct. at 1243).

Similarly, in the case at bar, there is no connection in the single conspiracy allegedly involving the three members of the union with that of the petitioner herein.

The Supreme Court in *Kotteakos* held that such proof created a material variance with an indictment charging a single conspiracy and, as such, was reversible error. *See also, United States v. Elliott, supra*, 571 F. 2d at 900. *See*, too, *United States v. Baldarrama*, 566 F. 2d 560, 565-66 (5 Cir. 1978), *cert. denied*, 437 U.S. 906, 98 S. Ct. 3094.

It is therefore urged that a variance between a single conspiracy indictment and evidence of multiple conspiracy should be treated not as a "variance" problem at all, but rather as a "misjoinder" question under Federal Rule of Criminal Procedure 8(b). [*See* J. Moore, 8 Moore's Federal Practice, p. 8.06(4) (1981)].

Rule 8(b) — which was enacted after the Supreme Court's decision in *Kotteakos* — is aimed at precisely the problem faced in that case: the transference of guilt among defendants who should not have been joined together in a single trial. The treatment of the multiple conspiracy doctrine as a variance issue despite the subsequent development of Rule 8(b), arguably creates a serious anomaly in the law. If the Government indicts several defendants under a single conspiracy count and yet proves multiple

conspiracies at trial, a material variance results and the defendants are each entitled to a new trial if they can show that their substantial rights were affected by the variance. (*See, e.g., United States v. Elliott, supra,* at 900). If, however, the Government indicts several defendants in an indictment that alleges what amounts to multiple conspiracies, and the District Court nevertheless refuses to sever the trial, the defendants are each entitled to a new trial *without any showing of prejudice,* for misjoinder under Rule 8(b) is *inherently prejudicial. [See, e.g., United States v. Lane,* 584 F. 2d 60, 62 (5 Cir. 1978); J. Moore, *supra,* at p. 8.04(2)$_1$.

The end result of the separate development of these two lines of authority — one under variance doctrine and the other under Rule 8(b) — means that the trial of multiple conspiracies is treated differently on appeal depending on whether the Government fails to introduce evidence of a single conspiracy at trial (*i.e.,* a variance requiring reversal if substantial rights are affected) or instead fails in the indictment to allege facts sufficient to constitute a single conspiracy [*i.e.,* a misjoinder under Rule 8(b), requiring reversal in all cases irrespective of prejudice].

As difficult as this anomaly may be to justify, it is submitted that *Schaffer v. United States,* 362 U.S. 511, 80 S. Ct. 945, ruled that the propriety of joinder under Rule 8(b) is to be judged according to the language of the indictment, not according to the Government's proof at trial. Thus, so long as the indictment alleges facts that amount to a single conspiracy, it matters not — as far as Rule 8(b) is concerned — that the Government fails to introduce at trial proof of a single conspiracy.

Read out of context, without attention to the facts of the case or to the court's rationale, *United States v. Elliott, supra,* would seem to support the Government's position, *i.e.,* that the defendants' participation in the same "RICO" enterprise is enough to tie otherwise multiple conspiracies together even where, as here, there is no agreement of any kind between the members of the two separate conspiracies. *See* C. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO,* 65 Iowa L. Rev. 837, 876-79 (1980).

Assuming *arguendo* that a variance existed, although we believe that there is strong evidence that misjoinder is established, we must consider two seminal cases on the question, namely *Berger v. United States,* 295 U.S. 78, 55 S. Ct. 679 and *Kotteakos v. United States, supra.*

Berger announced the rule that such a variance is fatal only if it has affected the substantial rights of the accused, 295 U.S. at 81-82, and went on to find no such effect on the facts of that case.

The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. (295 U.S. at 82).

In *Kotteakos,* by contrast, the Court did find that the defendants had been sufficiently prejudiced to justify reversal.

When the Government tries multiple conspiracies under a single count, an important right is at stake in addition to those cited in *Berger:*

> "The right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others. (Kotteakos, 328 U.S. at 775)."

It must be noted that prejudice inhered in the *Kotteakos* trial *not* because of the number of defendants or conspiracies per se, but because of the "dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise . . ." (328 U.S. at 774, 66 S. Ct. at 1252).

Since the defenses and the procedures in this case revealed a violent attack against petitioner Cotler by the three other defendants in the case, coupled with all the factors we have already adverted to, it is obvious that transference of guilt not only

occurred, but was fostered by dint of the defenses of the other three defendants in the case.

The sharply contradictory defenses and the allegations of guilt hurled at Cotler by the other three defendants, to say nothing of the Government, is still another reason why a severance should have occurred because it precluded a fair trial altogether. (*See* Fifth Amendment, United States Constitution — Due Process Clause).

Thus, we see that in the case at bar there was at least a variance in the presentation of the case and we urge that there was a clear misjoinder. In any event, because of the antagonistic and contradictory positions of the three defendants as against Cotler, there was no possibility of a fair trial for Cotler and, in essence, he had four prosecutors conducting a case against him. On this latter basis as well, therefore, we maintain that he should have been severed. Certiorari should be granted.

II.

The grand jury that indicted the petitioner herein comprised a quorum of twelve persons who did not attend all twenty-three sessions of that body. Accordingly, the grand jury which voted the indictment could not possibly have acted within the contemplation of Federal Rules of Criminal Procedure 6(f).

The court below quite frankly concedes that a "difficult question is presented" by the complaint against the grand jury because "not all who voted for the indictment had attended all twenty-three sessions." (Slip opinion, p. 14a). It was found by the Court of Appeals that of the twelve votes mandated under F. R. Cr. P. 6(f) "three of the voting jurors attended every session, four missed one session each, three were absent from two sessions each and two jurors were not present three sessions each."

The court below was sufficiently concerned about what had occurred to make a direction that where grand jurors miss sessions that they be provided with the minutes of the session which they missed so as to familiarize themselves with what occurred (*id.* pp. 14a, 15a). But this was *not* done herein.

The trial court would not unseal the records of the grand jury so it is even as of this date impossible to tell what important matters may have occurred when a mandatory minimum quorum was not available.

If a trial juror missed any session, obviously there would have to be a mistrial.

While it is true that a grand jury cannot convict in the sense that a petit jury can, it is equally obvious that the finding of an indictment very often is virtually as devastating as a conviction, particularly in the case of a person such as petitioner Cotler, who runs a large trucking organization and whose reputation and business are seriously affected by any adverse publicity.

The court below apparently was of the opinion that error occurred when a minimum quorum of twelve grand jurors were clearly not present at each of the twenty-three sessions of the grand jury.

It must be presumed that each session was of some importance, and we are not given information as to the length of the respective sessions. For example, there were four defendants who ended up being indicted by the grand jury, which includes Cotler.

It may very well be that the session which was missed was perhaps the most crucial involving Cotler.

Moreover, the opinion of the court below, which notes that only three of the voting jurors attended every session, necessarily implies that there may very well have been nine jurors absent from the quorum of twelve needed to indict at a time when the most crucial evidence involving Cotler was presented.

We respectfully submit that this Court should address itself to the dilemma thus posed, which we believe is of constitutional dimension, because the Fifth Amendment clearly declares that "No person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment or indictment of a Grand Jury. . ."

The history of the grand jury is rooted in the common and civil law, extending back to Athens, pre-Norman England, and the Assize of Claredon promulgated by Henry II.[3] The right seems to have been first mentioned in the colonies in the Charter of Liberties and Privileges of 1683, which was passed by the first assembly permitted to be elected in the colony of New York.[4] Included from the first in Madison's introduced draft of the Bill of Rights, the provision elicited no recorded debate and no opposition. "The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor."[5]

The prescribed constitutional function of grand juries in federal courts is to return criminal indictments, but the juries serve

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3. Morse, *A Survey of the Grand Jury System,* 10 Ore. L. Rev. 101 (1931).

4. B. Schwartz, *The Bill of Rights: A Documentary History* (New York: 1971), 162, 166. The provision read: "That in all Cases Capitall or Criminall there shall be a grand Inquest who shall first present the offence. . . ."

5. *Costello v. United States,* 350 U.S. 359, 362 (1956).

a considerably broader series of purposes as well. Principal among these is the investigative function, which is served through the fact that grand juries may summon witnesses by process and compel testimony and the production of evidence generally. Operating in secret, under the direction but not control of a prosecutor, unbound by a number of evidentiary and constitutional restrictions, such juries may examine witnesses in the absence of their counsel and without informing them of the object of the investigation or the place of the witnesses in it.[6] Besides indictments, grand juries may issue as well reports which may indicate nonindictable misbehavior, mis- or malfeasance of public officers, or other objectionable conduct.[7] Despite the vast power of grand juries, there is little in the way of judicial or legislative

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6. *Cf. United States v. Scully*, 225 F. 2d 113, 116 (C.A. 2), *cert. denied*, 350 U.S. 897 (1955). The privilege against self-incrimination must be observed by the grand jury, *Blau v. United States*, 340 U.S. 159 (1950); *Hoffman v. United States*, 341 U.S. 479 (1951), as well apparently as the Fourth Amendment protection against unreasonable searches and seizures, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Hale v. Henkel*, 201 U.S. 43, 76-77 (1906); *cf. In re Dionisio*, 442 F. 2d 276 (C.A. 7, 1971), and *Mara v. United States*, 454 F. 2d 580 (C.A. 7, 1971) (Fourth Amendment limitations on compelled production of voice exemplars and handwriting samples). Additionally, the husband-wife privilege, *Blau v. United States*, 340 U.S. 332 (1951), and the attorney-client privilege, *Alexander v. United States*, 138 U.S. 353 (1891), may be asserted before a grand jury. The Court has interpreted a provision of federal wiretap law, 18 U.S.C. §2515, to prohibit utilization of unlawful wiretap information as a basis for questioning witnesses before grand juries. *Gelbard v. United States*, 408 U.S. 41 (1972). The traditional secrecy of grand jury proceedings has been relaxed a degree to permit a limited discovery of testimony. *Compare Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959), *with Dennis v. United States*, 384 U.S. 855 (1966). There is no constitutional right to counsel before grand juries, *In re Groban*, 352 U.S. 330, 333 (1957).

7. The grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime." *Blair v. United States*, 250 U.S. 273, 281 (1919). On the report's function of the grand jury, *see In re Grand Jury January, 1969*, 315 F. Supp. 662 (D.C.D. Md. 1970), and *Report of the January 1970 Grand Jury* (Black Panther shooting), U.S.D.C.N.D. Ill., released May 15, 1970. Congress has now specifically authorized issuance of reports in cases concerning public officers and organized crime. 18 U.S.C. §333.

response designed to impose some supervisory restrictions on them.[8]

Since a person can be tried only upon the indictment as found by a grand jury, and only upon its language found in the charging part of the instrument, the importance of the grand jury is readily recognized. [*Duke v. United States,* 301 U.S. 492 (1937); *Stirone v. United States,* 361 U.S. 212 (1960); and, *Ex Parte Bain,* 121 U.S. 1, 12 (1887)].

We therefore submit that any irregularity or defect, as we perceive herein, is a serious matter of constitutional dimension. For example, in *Peters v. Kiff,* 407 U.S. 493, 33 L. Ed. 2d 83, this Court held that where certain persons, such as negroes, were systematically excluded from the grand jury and petit jury, due process was denied. Where a grand jury was not properly selected, the defendant's constitutional rights were denied (*Alexander v. Louisiana,* 405 U.S. 625, 31 L. Ed. 2d 536).

Finally, in *Rose v. Mitchell,* 443 U.S. 545, 61 L. Ed. 2d 739, this Court held that federal habeas corpus courts may consider a claim of racial discrimination in a grand jury, even if no taint or error at trial resulted in a conviction.

What the foregoing cases and others clearly indicate is that scrupulous fairness must be accorded in the grand jury proceedings, and the absence of three-quarters of a mandatory minimum quorum, on its face, appears to be clearly violative of the Fifth Amendment and of the entire concept of grand jury proceedings.

Moreover, we do not know whether or not the persons who were absent were of the same race or religious persuasion as the defendant, which could add certain other complications.

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8. Congress has required that in the selection of federal grand juries, as well as petit juries, random selection of a fair cross section of the community is to take place and has provided a procedure for challenging discriminatory selection by moving to dismiss the indictment. 28 U.S.C. §§1861-1868.

Finally, we do not know what occurred at the respective sessions when the grand jurors were absent, because the courts below have refused to unseal the grand jury minutes.

III.

The failure to suppress evidence gathered as a result of court-authorized wiretaps and searches and seizures were error since the supporting affidavit failed to demonstrate the probable cause to conduct a search at the times and places requested. Moreover, the requirements of such cases as *Aguilar v. United States*, 378 U.S. 108, 12 L. Ed. 2d 723, and *Spinelli v. United States*, 393 U.S. 401, 21 L. Ed. 2d 637, were not honored. Finally, the five search warrants issued in reliance upon the Hersh affidavit were so overly broad as to constitute "general warrants".

The five searches conducted herein with respect to petitioner Cotler rested upon affidavits of Agent John Hersh dated April 3 and April 17, 1979. Petitioner submits that these affidavits were constitutionally deficient because substantial portions thereof were totally irrelevant in terms of time and place and for the purpose of demonstrating probable cause.

The touchstone for judging the sufficiency of the hearsay portions of Hersh's affidavits is *Aguilar v. United States*, 378 U.S. 108, 12 L. Ed. 2d 723 (1964). In *Aguilar* the Supreme Court promulgated a "two-pronged" test by which to judge the sufficiency of affidavits based upon information provided by informants. First, the underlying circumstances of the informant's knowledge must be demonstrated in order to ensure that it is not based on mere rumor, speculation, underlying hearsay or even fabrication. Secondly, the affiant must have some basis to believe that the informant is credible and his information reliable. *Id.* at 114-115, 12 L. Ed. 2d 723, 729.

Hersh related information purportedly supplied by several informers, three of whom were former officers in Vornado, Inc. (A26-28). The affiant did not even make a minimum effort to vouch for the credibility of Joseph Brady, Daniel Sorrell and Sol Rogoff. Consequently, the information supplied by these

individuals patently failed the second "test" of *Aguilar* and should have been treated accordingly by the reviewing judicial officer.

Furthermore, the Hersh affidavits referring to information from two principal informers, namely Ralph Picardo and Joseph Szapor, indicate virtually no specific allegations of reliability were ever set forth by Hersh, but merely general, vague, conclusory statements were made.

Nor were the affidavits salvaged by sufficient corroborative information because the reliability of the informants was woefully lacking (*Spinelli v. United States,* 393 U.S. 401, 21 L. Ed. 2d 637).

Irving Cotler submits that neither the hearsay nor the direct investigative averments set forth in the Hersh affidavits, whether taken separately or together, established the probable cause necessary to sustain the validity of the wiretap order or the five search warrants issued in reliance thereon. Absent sufficient probable cause to sustain the issuance of those warrants, all evidence seized pursuant thereto should have been suppressed. *See, e.g., Davis v. Mississippi,* 394 U.S. 721, 22 L. Ed. 2d 676 (1969). F.R. Crim. P. 41.

In addition, to the extent that Hersh's April 17th affidavit relied in part (A53) upon the fruits of wire interceptions authorized by the April 3rd order (A46), they are "tainted" and should be disregarded in the court's analysis of the second affidavit. *Wong Sun v. United States,* 371 U.S. 471, 9 L. Ed. 2d 441 (1963).

With respect to the five search warrants that were issued, we maintain they were so overly broad as to constitute what amounted to a "general search". The search warrants, in essence, authorized precisely what Hersh requested, virtually without qualification.

The language of the five search warrants sets virtually no parameters on the areas to be searched or the items to be seized. This is especially true of those warrants relating to Irving Cotler's residence and office. They authorized nothing less than an exploratory search.

> "To condone what happened here is to invite a government official to use a seemingly precise and legal warrant to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant. Stanley v. Georgia, 394 U.S. supra at 572, 22 L. Ed. 2d 542, 553 (JJ Stewart, Brennan and White, concurring)."

As general warrants they were invalid and the fruits of the searches conducted pursuant to them should have been suppressed.

IV.

Once and for all, we ask this Court to resolve the dilemma which exists because of the decision in *United States v. White*, 401 U.S. 745, 28 L. Ed. 2d 453, which was a plurality opinion of this Court, and which alone is relied upon by lower courts to authorize participant monitoring and taping of conversations without court order, upon the pretext that one of the participants to the conversation has consented thereto.

Since the opinion of this Court by a 4 to 4 split, in *United States v. White*, 401 U.S. 745, lower courts and agents throughout the country have assumed that they are authorized to employ electronic surveillance of any type without court order so long as one of the participants to the conversation has consented.

We submit that this Court should at least take this opportunity to resolve this dilemma by making it crystal-clear that *White* was decided prior to *Katz v. United States*, 389 U.S. 347, and as such, is not a precedent for gross violations of the Fourth Amendment and the destruction of a person's reasonable expectation of privacy.

It is respectfully contended that *White* was a plurality opinion of the Supreme Court of the United States and was decided prior to *Katz v. United States*, 389 U.S. 347, 364.

Just a mere plurality of the Supreme Court voted to save the "misplaced confidence" doctrine of *On Lee v. United States*, 343 U.S. 747 and *Lopez v. United States*, 373 U.S. 427.

This "misplaced confidence" exception to the normal warrant requirement is inconsistent with the "reasonable expectation of privacy" standard of *Katz v. United States*, 389 U.S. 347, and we maintain should therefore be abolished. [*See Holmes v. Burr*, 486 F. 2d 55 (9 Cir. 1973), *cert. denied*, 414 U.S. 1116.]

It will be recalled that Justice Black's cryptic concurrence in *United States v. White, supra*, mentioned the fact that it did not apply since this was pre-Katz eavesdropping. (*See Olmstead v. United States*, 277 U.S. 438.)

Justice Black cast the swing vote in *United States v. White*, and his concurrence in the judgment of the court was for the reason set forth in his dissent in *Katz v. United States*, 389 U.S. 347, 364. However, he also noted "his adherence" to "his views expressed in Linkletter v. Walker, 381, U.S. 618". In *Linkletter*, Mr. Justice Black maintained that *Mapp v. Ohio*, 367 U.S. 643, should have been applied retroactively.

It must be borne in mind that in his concurrence in *United States v. White*, Justice Black reasserted the position which he had taken in *Katz*, namely that electronic surveillance was not within the ambit of the Fourth Amendment.

In *Katz v. United States*, however, the Supreme Court made it very clear that seizure of the spoken word was within the purview of the Fourth Amendment and, consequently, Black's concurring and controlling fifth vote is inapplicable in view of *Katz v. United States*.

It is argued that: (1) electronic recording produces more reliable evidence than human recollection; (2) that law enforcement authorities need unhampered electronic surveillance to protect us from crime; (3) that the exclusion of evidence obtained in this way hurts society. These arguments do not hold up.

Evidence obtained by machine is not necessarily more reliable than human recollection. A machine has considerable ability to distort. It focuses on a single element in a total environment and can yield deceptive results. A recorder captures voices without

facial expressions, gestures, and other subtle details. Nor is a picture any more accurate. But the reliability argument really is irrelevant. Evidence obtained by illegal search or seizure is excluded not because of unreliability, but because of the values its exclusion protects.

As for the second argument, the Government's legitimate interest in detecting and preventing crime must be balanced against the individual's freedom from unjustified intrusions. That balance was struck by the draftsmen of the Fourth Amendment when they required advance authorization of searches and seizures by a magistrate upon a showing of probable cause.

Rarely articulated but frequently evinced hostility to the Exclusionary Rule underlies the third argument:

> "The case presents some of the most vexing and pressing problems of our day: What are the constitutional limitations on governmental electronic intrusions into privacy? Do the Fourth and Fourteenth Amendments circumscribe warrantless, electronic intrusions as effectively as they limit corporeal invasions of privacy? Are the protections of the Fourth and Fourteenth Amendments diluted if the person subjected to the warrantless electronic intrusion is suspected of a crime?" (Dissent of Hufstedler, J. in *Holmes v. Burr, supra*).

The dissenting opinion in *Holmes v. Burr, supra,* went on to explain the impact of warrantless surveillance:

> "The corrosive impact of warrantless participant monitoring on our sense of security and freedom of expression is every bit as insidious as electronic surveillance conducted without the consent of any of the parties involved. In terms of the individual's reluctance to speak freely, no qualitative difference exists between the danger posed by third party interception and the risk that his auditor has

> sanctioned a secret recording of their conversation. . . ."

The holding of *Olmstead* was finally overruled in *Katz v. United States.* There the court explained:

> "The Fourth Amendment protects people, not places."

Tucked into *Olmstead* was a passing reference to the theory that persons subject to warrantless electronic interception volunteer their statements to the Government by their very act of talking to each other. This theory later emerged as the constructive consent and assumption of the risk fictions relied on in *On Lee v. United States, supra,* 343 U.S. 753-54 and *Lopez v. United States, supra,* 373 U.S. at 439. In *Lopez,* the majority added the variation that a person talking face-to-face with a known government agent assumes the risk that the agent will be able to repeat the conversation either by total personal recall or by a corroborative recording which in its nature is more reliable than human recollection. The theme was replayed in a slightly different key by the plurality in *United States v. White.*

Using familiar jurisprudential tools, *Holmes* can be successfully distinguished from every Supreme Court decision directly bearing on the case other than *Katz.* Thus, *On Lee* and *Lopez* not only are factually dissimilar but, more importantly, were based on trespassory concepts discredited by *Silverman v. United States,* 365 U.S. 505 (1961); *Osborn v. United States,* 385 U.S. 323; and *Berger v. New York,* 388 U.S. 41 and destroyed by *Katz. Rathburn v. United States,* 355 U.S. 107 (1957), dealt with governmental eavesdropping by extension telephone without electronic recording, and the decision was confined to an interpretation of Section 605 of the 1934 Federal Communications Act (47 U.S.C. §605). *Schwartz v. Texas,* 344 U.S. 199 (1952), involved facts similar to *Rathburn,* but the decision was based on the pre-*Mapp* authority refusing to apply the exclusionary rule to state courts. *Schwartz* was overturned by *Lee v. Florida,* 392 U.S. 378 (1968), a post-*Mapp* case, holding inadmissible under Section 605 telephone conversations overheard on a party line and not recorded. *Lewis v. United States,* 385 U.S. 206 (1966)

and *Hoffa v. United States,* 385 U.S 293 (1966), like *Holmes,* concerned the use of confidants who were secretly governmental informers, but in neither case was electronic surveillance employed. The facts in *White* were closer to those in *On Lee* than to *Olmstead* or *Holmes.* But of much greater significance, *White* necessarily applied pre-*Katz* law because the electronic surveillance of *White* occurred before *Katz* was decided, and *Katz* had been earlier held nonretroactive in *Desist v. United States,* 395 U.S. 244 (1969). *United States v. White,* is nevertheless important because it reveals continuing reliance by some of the justices on the assumption of the risk doctrine. [*See United States v. White,* at 754 of 401 U.S. (White, J.)].

Although the holding in *White* was based upon the nonretroactivity of *Katz,* several of the justices did express views on the effect of *Katz* on participant electronic surveillance. Mr. Justice White, writing for the Chief Justice and Justices Stewart and Blackman, suggested than *On Lee* remained sound law. Justices Brennan, Douglas, Harlan and Marshall each wrote separate opinions arguing that the result in *On Lee* could not survive *Katz.* Mr. Justice Black, concurring in the judgment of the court, did not address this issue, merely reasserting the position taken in his *Katz* dissent that elecronic surveillance was not within the ambit of the Fourth Amendment.

Proponents of the assumption of the risk doctrine, apparently recognizing the significant intrusion upon an individual's privacy caused by participant monitoring, do not say that everyone must anticipate and risk warrantless surveillance; rather, they limit its application to those who contemplate illegal activity. But never do these proponents explain how, absent the Fourth Amendment requirement of antecedent justification before a neutral magistrate, the sinful can be separated from the saintly without probing everyone or leaving the selection to the unbridled discretion of government agents.

Adoption of the assumption of the risk theory ultimately rests on the cynical conclusion that a warrantless search is justified by what it reveals.

In the conclusion of her dissenting opinion, Judge Hufstedler, in *Holmes v. Burr, supra,* set forth cogent argument indicating how destroying a right protected by the Fourth Amendment because of distaste for the remedy, ultimately destroys the Fourth Amendment itself. In 486 F. 2d 55, 58, the dissent explained:

> "Dissatisfaction with the exclusionary rule as the predominate remedy for conduct violating the Fourth Amendment is understandable and defensible. Attacks on the constitutional right of privacy as the means of expressing dissatisfaction with the remedy are intellectually indefensible and dangerous. A constitutional right continuously diluted becomes no right. Destroying a right protected by the Fourth Amendment because of distaste for the remedy makes little more sense than destroying a patient for failure to respond to chosen medication. If the remedy is wrong, it is time to reexamine the remedy, not to diminish the right."

CONCLUSION

We incorporate by reference arguments made below and also adopt the legal arguments contained in the petition of Nunzio Provenzano, a co-defendant at trial who has indicated that he will also petition this Court for certiorari.

We ask that certiorari be granted because of the important issues presented herein.

Respectfully submitted,

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